A

CHU TAK FAI

v.

PP

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ARIFIN ZAKARIA FCJ
NIK HASHIM FCJ
C AUGUSTINE PAUL FCJ
[CRIMINAL APPEAL NO: 05-4-97(K)]
9 NOVEMBER 2006

D ***CRIMINAL LAW:*** *Dangerous drugs - Trafficking in dangerous drug - Chemical test - Sufficiency of samples for analysis - Whether minimum of 10% of drug must be taken therefor - Loo Kia Meng v. PP & Leong Bon Huat v. PP - Whether no longer good law - Dangerous Drugs Act 1952, ss. 37(j), 39B(1)(a), 39B(2)*

E ***CRIMINAL LAW:*** *Dangerous drugs - Trafficking in dangerous drug - Evidence of chemist - Chemist analysed all packages of drug sent for analysis - Failure to state weight of samples taken for analysis - Whether inconsequential - Dangerous Drugs Act 1952, ss. 37(j), 39B(1)(a), 39B(2)*

F ***CRIMINAL PROCEDURE:*** *Jurisdiction of court - Federal Court - Exercise of power of review - Power to interfere 'to prevent injustice or abuse of process of court' - Principles - Rules of the Federal Court 1995, r. 137*

G ***WORDS & PHRASES:*** *"Injustice" - Purport and meaning - Rule 137, Rules of the Federal Court 1995*

The applicant herein was sentenced to death for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Having
H exhausted the resources for appeal, but aggrieved still with his fate, the applicant filed a motion imploring the Federal Court to exercise its inherent powers under r. 137 Rules of the Federal Court 1995 and set aside the conviction and sentence. The applicant argued that his conviction and sentence could not stand,
I as the evidence of PW3, the chemist, was defective for not stating the weight of the drug samples taken for analysis. It was stressed that such a defect, upon the authority of the Court of

Appeal in *Loo Kia Meng v. PP* and the Supreme Court in *Leong Bon Huat v. PP*, afforded sufficient ground for interference by the apex court under the rule. The prosecution submitted that there was nothing wrong with the evidence of the chemist, as the chemist had positively affirmed that he did not rely on s. 37(j) of the Act (which required a minimum of 10% to be taken for analysis from the receptacle), and had further analysed all the 17 packages sent to him for the analysis. Upon the arguments, the learned appellate judges took it upon themselves to re-examine *Loo Kia Meng* and *Leong Bon Huat*, and determine whether this was a fit and proper case for the court to exercise its inherent jurisdiction under the rule.

Held (dismissing the motion)
Per Nik Hashim FCJ delivering the judgment of the court:

(1) The principle governing the jurisdiction and exercise of the power to review by the Federal Court is now well settled. The Federal Court, as the apex court, does have the jurisdiction and power to hear and review any matter brought before the court under r. 137. Only that, such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances where there is no alternative remedy available to prevent an injustice or to prevent an abuse of the process of the court. (para 9)

(2) Of crucial importance is the meaning of the word "injustice" in r. 137. Injustice must mean, firstly lack of fairness or justice and secondly an unjust act. Whether an act is unjust or not is a question of law – and in this case – it depends on the determination of whether the failure of the chemist (PW3) to specify the weight of the samples used in the analysis of the drug was unjust or had caused an injustice to the applicant or an abuse of the process of the court which needed to be rectified or prevented. (para 12)

(3) On the facts, the presumption in s. 37(j) of the Act is obviously inapplicable. It is clear from the evidence that the chemist had analysed all the 17 packages, *ie*, 100% or the whole quantity of the whitish substance handed to him, thereby making it unnecessary for the chemist and the prosecution to rely on s. 37(j) of the Act. In any event, the ten per centum stipulated in s. 37(j) refers to the number of

receptacles and not the total weight of the drug found or the total amount or weight of the samples taken for analysis. Section 37(j) only requires the taking of samples from ten per centum of the total number of the receptacles and not the drug. (paras 18 & 19)

(4) It is clear therefore that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed the chemist evidence must be challenged and evidence in rebuttal must be led, if necessary. (para 21)

(4a) It follows that *Loo Kia Meng*, in so far as it holds that a minimum of 10% of the drug must be taken for analysis, and *Leong Bon Huat* in so far as it holds that chemical tests must be carried out on adequate quantities (samples) of the drug, are decisions which we are unable to agree and should not be followed. (para 23)

(5) The chemist in the present case cannot be faulted and his testimony is not defective. Indeed, there is no lack of fairness or justice in the evidence of the chemist. This is not the kind of case where this court should invoke its inherent powers under r. 137. (para 25)

Bahasa Malaysia *translation of headnotes*

Pemohon telah dijatuhkan hukuman mati atas kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Setelah menghabiskan sumber-sumber rayuan, tetapi masih terkilan dengan nasibnya, pemohon memfailkan usul memohon supaya Mahkamah Persekutuan mengenepikan sabitan dan hukuman dengan cara melaksanakan kuasa semulajadinya di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995. Menurut pemohon, sabitan dan hukumannya tidak boleh dipertahankan disebabkan keterangan ahli kimia, PW3, adalah cacat kerana gagal menyebut berat sampel dadah yang diambil untuk penganalisaan. Ditekankan selanjutnya bahawa kecacatan sedemikian adalah mencukupi bagi campur tangan mahkamah tertinggi di bawah kaedah, berdasarkan keputusan Mahkamah Rayuan dalam *Loo Kia Meng v. PP* dan Mahkamah Agong dalam *Leong Bon Huat v. PP*. Pendakwaan

berhujah bahawa tiada kelemahan pada keterangan ahli kimia kerana beliau dengan jelas mengesahkan bahawa beliau tidak bergantung kepada s. 37(j) Akta (yang mensyaratkan 10% diambil dari receptacles untuk analisa), selain dari menganalisa kesemua 17 bungkusan yang dihantar kepadanya untuk penganalisaan. Atas hujah-hujah yang dikemukakan, yang arif hakim-hakim rayuan dengan itu melihatnya sebagai wajar untuk memeriksa kembali *Loo Kia Meng* dan *Leong Bon Huat* dan seterusnya memutuskan sama ada kes di sini merupakan kes yang sesuai untuk mahkamah melaksanakan bidangkuasa semulajadinya di bawah kaedah.

Diputuskan (menolak usul)
Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah:

(1) Prinsip yang mengawal bidangkuasa dan pelaksanaan kuasa semakan Mahkamah Persekutuan sudah pun mantap. Mahkamah Persekutuan, sebagai mahkamah tertinggi, mempunyai bidangkuasa dan kuasa untuk mendengar dan menyemak apa jua perkara yang di bawa ke hadapannya di bawah k. 137, dengan syarat ianya dilaksanakan secara berhati-hati dan hanya dalam keadaan-keadaan yang khusus dan tertentu sahaja iaitu di mana tidak ada lagi remedi lain bagi menghalang ketidakadilan atau menghalang salah guna proses mahkamah.

(2) Sesuatu yang sangat penting adalah maksud perkataan "ketidakadilan" di dalam k. 137 tersebut. Ketidakadilan bermakna ketiadaan kesaksamaan atau keadilan, dan keduanya perbuatan yang tak adil. Sama ada sesuatu perbuatan itu tidak adil atau sebaliknya adalah satu persoalan undang-undang – dan dalam kes semasa – ianya bergantung kepada penetapan sama ada kegagalan ahli kimia (PW3) menentukan berat sampel yang digunakan oleh beliau untuk menganalisa dadah berkenaan adalah tidak adil atau telah menyebabkan ketidakadilan kepada pemohon ataupun merupakan salah guna proses mahkamah yang perlu diperbetulkan atau dihalang.

(3) Atas fakta, anggapan di s. 37(j) Akta jelas tidak terpakai. Adalah jelas dari keterangan bahawa ahli kimia telah menganalisa kesemua 17 bungkusan, iaitu 100% ataupun keseluruhan kuantiti barangan berwarna keputihan yang

diserahkan kepadanya, sekaligus menjadikan tidak perlu lagi bagi ahli kimia mahupun pendakwaan untuk bergantung kepada s. 37(j) Akta. Walau apapun, sepuluh peratus yang diungkap oleh s. 37(j) merujuk kepada jumlah receptacles dan bukannya jumlah keseluruhan berat dadah yang dijumpai atau jumlah atau berat keseluruhan sampel yang diambil untuk penganalisaan. Seksyen 37(j) hanya mensyaratkan pengambilan sepuluh peratus dari jumlah keseluruhan receptacles, bukannya dadah.

(4) Adalah dengan itu jelas bahawa tidak ada syarat mengenai berapa jumlah atau berat sampel yang perlu diambil oleh ahli kimia bagi tujuan penganalisaan. Terpulang kepada ahli kimia untuk menjalankan analisa secara saintifik. Juga terpulang kepadanya untuk menentukan kecukupan sampel bagi maksud penganalisaan. Jika pihak pembelaan berhasrat untuk mencabar kecukupan berat dadah yang dianalisa maka mereka perlu mencabar keterangan ahli kimia dan keterangan menyangkal hendaklah dikemukakan, jika perlu.

(4a) Ianya mengikut bahawa *Loo Kia Meng*, setakat mana ia memutuskan bahawa 10% dadah hendaklah diambil untuk penganalisaan, dan *Leong Bon Huat* setakat mana ia memutuskan bahawa ujian-ujian kimia perlu dijalankan atas jumlah sampel dadah yang mencukupi, adalah merupakan keputusan yang tidak dapat dipersetujui oleh kami dan dengan itu tidak harus diikuti.

(5) Ahli kimia dalam kes di sini tidak boleh dipersalahkan dan testimoni beliau juga tidak cacat. Malahan, tiada kekurangan kesaksamaan atau keadilan pada keterangan beliau. Maka ini bukanlah kes di mana mahkamah ini harus melaksanakan kuasa-kuasa semulajadi di bawah k. 137.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 CA ***(refd)***

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Anor Application [2004] 4 CLJ 350 FC ***(refd)***

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2005] 4 CLJ 29 FC ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(foll)***

Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(foll)***

Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(ovrd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(ovrd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***
Munusamy v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Ooi Teng Chian [2005] 4 CLJ 557 CA ***(foll)***
Raja Prithwi Chand v. Sukhraj Rai AIR 1941 ***(refd)***
Re Uddin [2005] 3 All ER 550 ***(refd)***
Seray-Wurie v. Hackney London Borough Council [2002] 3 All ER 448 ***(refd)***
Taylor & Anor v. Lawrence & Anor [2002] 2 All ER 353 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(j), 39A(2), 39B(1)(a), (2)
Rules of the Federal Court 1995, r. 137

Other source(s) referred to:
The Concise Oxford Dictionary, 9th edn, p 700

For the applicant - Karpal Singh (Ramkarpal Singh & Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the respondent/prosecution - Mohd Yusof Hj Zainal Abiden SDPP (Wong Chiang Kiat DPP with him)

[Appeal from Court of Appeal; Criminal Appeal No: K-05-40-1994]

Reported by WA Sharif

JUDGMENT

Nik Hashim FCJ:

Application

[1] This is yet another application under r. 137 of the Rules of the Federal Court 1995 (r. 137). By a notice of motion the applicant applies to this court to set aside his conviction and sentence of death or make such order or further order deemed fit and proper in the interest of justice.

[2] The facts of the case are that on 30 April 1993 the applicant, a Hong Kong resident, was found to be carrying 17 packages containing heroin upon a body search at the immigration control post in Bukit Kayu Hitam, Kedah. He was charged with trafficking in 2,125.4 grammes of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the Act. At the end of the trial the applicant was convicted and sentenced to death by the High Court at Alor Setar Kedah on 11 October 1994. Dissatisfied with the decision, the applicant appealed to the Court of Appeal. On 16 April 1997 the Court of Appeal dismissed the appeal and affirmed the conviction and sentence of the High Court. The applicant appealed to the Federal Court against the decision of the Court of Appeal. On 20 August 2001, the Federal Court (Mohamed Dzaiddin CJ, Steve Shim CJ (Sabah & Sarawak) and Haidar FCJ) dismissed the appeal of the applicant. And there was no written grounds of judgment of the Federal Court in this case.

[3] Meanwhile, a petition for clemency on behalf of the applicant was presented to the Pardons Board, Kedah.

[4] We were informed by the learned counsel for the applicant and confirmed by the learned Senior Deputy Public Prosecutor (DPP) for the respondent that on 19 April 2006 the Pardons Board, Kedah commuted the sentence of death to that of imprisonment for life.

[5] It is relevant at this point to reproduce r. 137 which reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Preliminary Objection

[6] At the outset of the proceedings, the respondent raised a preliminary objection to the effect that r. 137 does not give the Federal Court the jurisdiction to hear this application nor to reopen and review the case on the merit as it had been conclusively settled by this court.

Threshold Question

[7] With respect, we do not agree with the respondent. Applications of this nature have been repeatedly heard by this court as demonstrated by the following cases:

(i) In *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 CLJ 61 (Mohamed Dzaiddin CJ, Steve Shim CJ (Sabah & Sarawak) and Haidar FCJ) Mohamed Dzaiddin CJ said at p 72:

> Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.

In that case the Federal Court invoked r. 137 to set aside the judgment of the Federal Court on the ground that the court was not duly constituted as there was only one judge remaining out of the three presiding judges, the other two having retired, when the judgment was pronounced.

(ii) In *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 (Wan Adnan CJ (Malaya), Steve Shim CJ (Sabah & Sarawak), Abdul Malek FCJ, Ahmad Fairuz FCJ (as they then were) and Mohtar Abdullah FCJ) Steve Shim CJ (Sabah & Sarawak) invoked r. 137 to prevent an injustice done to the appellant as he had been denied the right to have his appeal heard on its merits by the Court of Appeal. As the learned CJ (Sabah & Sarawak) said at p 666:

> Had the Court of Appeal considered r. 102 of the RCA, it would have taken note of the following salient facts: that there was no dispute as to the contents of the order appealed against; that the appellant had already filed and served the appeal record containing a photocopy of the sealed order; that the authenticity of the said photocopy of the sealed order was not in dispute; that the appellant had also filed and served the supplementary appeal record containing the certified true copy of the sealed order and in addition, the appellant had tendered a certified true copy of the sealed order at the hearing of the appeal in open court. Given those factual circumstances, it would have been concluded that the respondent had neither been misled nor prejudiced in any way notwithstanding the defect. There was no substantial miscarriage of justice involved. That

A being the position, the defect was certainly curable under r. 102 of the RCA. In my view, the Court of Appeal's failure to consider r. 102 of the RCA has adversely affected its decision in upholding the preliminary objection of the respondent. On that basis, its decision is therefore flawed resulting in injustice to the appellant. In my view, this is a
B fit and proper case to invoke the inherent power of the court under r. 137 of the RFC in preventing such injustice.

Whereas Mohtar Abdullah FCJ in his separate judgment said at p. 692:

C This is a clear case where injustice has been done to the appellant who has been denied his right to have his appeal heard on its merit. This court has 'the inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the
D process of the court' (see r. 137 of the RFC). Litigants who come to court and obey its directions should not be punished for such obedience. And, if unfortunately on the rare occasion a litigant is unjustly punished, this court does have the jurisdiction and the power to correct that injustice.

E (iii) In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577 (Steve Shim CJ (Sabah & Sarawak), Siti Norma Yaakob FCJ (as she then was) and Haidar FCJ) Steve Shim CJ (Sabah and Sarawak), this court, besides agreeing with Mohamed Dzaiddin CJ in *Chia Yan Tek, supra*, over the
F provision of r. 137, opined on the inherent jurisdiction of the Federal Court at pp. 589 and 590 in the following words:

Inherent jurisdiction

G Let me say without more that whilst I agree with the applicant's counsel's contention that the Federal Court has inherent jurisdiction under the common law to review its previous decision, I am however unable to accept his stand that *Lye Thai Sang* was decided *per incuriam*. I agree entirely with the view expressed by the Supreme Court in *Lye Thai*
H *Sang* that s. 69(4) of the CJA could not be construed to confer an unlimited power on the Supreme Court to review an earlier decision in an appeal which had already been heard and disposed of and therefore, in that context, the Supreme Court had no power to reopen, rehear and
I reexamine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be placed on s. 69(4) of the CJA.

But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s. 3(1)(a) of the Civil Law Act 1956, read with art 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r. 137 of the Rules of the Federal Court 1995. This had also been reiterated very recently by the Federal Court in the case of *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1 wherein Mohamed Dzaiddin Chief Justice said at p 10:

> Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.

For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

(iv) In *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2004] 3 MLJ 517, the Federal Court (Abdul Malek Ahmad PCA, Siti Norma Yaakob FCJ (as she then was) and Alauddin FCJ) held:

(1) The Federal Court has the jurisdiction to hear an application under r. 137 of the RFC where it was found necessary to prevent injustice or to prevent an abuse of the process of the court.

(2) Under r. 137 of the RFC, the Federal Court has the jurisdiction and power to reopen and review any matter already decided by the court if there was allegation of injustice or abuse of the process of the court.

However, Siti Norma Yaakob FCJ (as she then was) in concurring that the preliminary objection by the respondent (that the Federal Court does not have the jurisdiction to hear an application under r. 137), is misplaced, cautioned that the

A exercise of the jurisdiction can only be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice.

In that case, the Federal Court dismissed the applicant's
B applications to allow fresh evidence to be adduced and to have his convictions and sentences set aside for lack of merits.

(v) In *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Anor Application* [2004] 4 CLJ 350 (Abdul Hamid Mohamad,
C Rahmah Hussain FCJJ, and Richard Malanjum JCA (as he then was)), the majority judgment (Rahmah Hussain FCJ & Richard Malanjum JCA (as he then was)) spelt out the wide jurisdiction of the Federal Court and the burden of establishing a case by an applicant under r. 137 as follows:

D (1) Rule 137 of the Rules of the Federal Court 1995 is the Federal law that gives the Federal Court the inherent powers and hence jurisdiction to hear matters such as the applications proper herein. It is therefore not correct to say that the Federal Court has no jurisdiction to entertain
E any application which seeks an order to review its earlier decision.

(2) Rule 137 RFC 1995 cannot be construed so as to limit the jurisdiction of this court only to situations where its
F earlier decision was a nullity either because the court making it was not properly constituted or was illegal or was lacking jurisdiction. In other words, the exercise of jurisdiction should not be confined to the standing of the coram that rendered the impugned decision. To limit
G therefore the application of r. 137 RFC 1995 to only certain situations would be tantamount to stifling the wide jurisdiction envisaged therein.

(3) When invoking r. 137 RFC 1995 an applicant has the
H onerous task of establishing to the satisfaction of the Federal Court that on the facts, circumstances and the law as applied in the impugned decision in issue, it occasioned an injustice or abuse of process which needs to be rectified or prevented. It is on a case by case basis. It was not the
I intention of the legislature when promulgating r. 137 RFC 1995 that every decision of the Federal Court should be subject to review. To do so would be anathema to the concept of finality in litigation.

(vi) In *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565 (Pajan Singh Gill, Rahmah Hussain FCJJ, and Richard Malanjum JCA (as he then was)), Pajan Singh Gill FCJ delivering the judgment of the Federal Court in dismissing an application under r. 137 which alleged that an injustice had occasioned in the main judgment thereby resulting in the rightful owner losing her lands vide forged documents, *inter alia*, ruled:

(1) The consequence and effect of the main judgment might be harsh when viewed without the benefit of the relevant statutory provision. However, this was not a case where grave injustice had occasioned due to clear infringement of law thereby making it permissible for successive application to be made under r. 137. The substance of the main judgment revolved in the interpretation of sub-s. (3) of s. 340 of the National Land Code including the proviso thereof. Based on the reasoning given in the main judgment and the words used in the said subsection and proviso, the interpretation given by the court was not patently wrong thereby resulting in grave injustice warranting a successive application under r. 137.

(2) There was much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by the apex court of this country. The application of r. 137 should not be made liberally as that might result in chaos to the system of judicial hierarchy. There would be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of injustice *vide* r. 137. If he succeeds in his application there is nothing to bar the other party from making his own application to overturn such success. There would be no end of the matter. This was not the intention of the legislature when promulgating the said rule.

(vii) In the recent case of *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29 (Ahmad Fairuz CJ, Abdul Hamid Mohamad and Pajan Singh Gill FCJJ), Abdul Hamid Mohamad FCJ, after deliberating on the earlier mentioned cases and some other cases cited therein, delivered the judgment of the Federal Court by holding that:

(1) This court had the jurisdiction to hear this application and the power to make the necessary orders; this jurisdiction and power was inherent in this court and it was reaffirmed by r. 137 of the RFC. From previous cases, it was clear that, so far, this court had only given orders that its previous decisions, judgments or orders were a nullity or invalid because the court giving such decisions, judgments or orders was not properly constituted. However, in the present application, the applicant questioned the findings of this court, both in law and on the facts. These were matters of opinion, and just because this court might disagree (this court did not say that it agreed or disagreed with such findings) with the earlier panel of this court, that did not warrant this court to review the decision. Similarly, regarding the interpretation and application of some provisions of the Companies Act 1965, even if this court disagreed with the earlier panel (again, this court did not say that it agreed or disagreed), that did not warrant this court to set aside the judgment and the order of the earlier panel of this court, and re-hear and review the appeal. Otherwise, there would be no end to a proceeding. It was the unanimous view of this court that this was not the kind of case which previous judgment and order this court should review. If and when, in another case, the same issue of law arose, then, after hearing a full argument, this court might reconsider and decide whether it agreed with its earlier view or not. This court had done that on a number of occasions before.

[8] Besides the above cases, our attention was also drawn to the following cases:

(i) The Federal Court of India in *Raja Prithwi Chand v. Sukhraj Rai* AIR [1941] ruled:

> The Federal Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. The rules which govern the practice of the Judicial Committee and of the House of Lords in matters of review govern the practice of the Federal Court as well in India. Consequently no case in the Federal Court can be re-heard and an order once made is final and cannot be altered. Nevertheless, in exceptional circumstances, an application for review can be entertained. The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by misprision in embodying the judgments, or have

been introduced through inadvertence in the details of judgments. It can also supply manifest defects in order to enable the decrees to be enforced, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard. But in no case however can a re-hearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the court: [1886] 11 AC 660; [1836] 1 Moo PC 117; [1871] LR 3 PC 664 and 14 Mad 439 (PC), Rel. on.

(ii) In *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353, the English Court of Appeal consisting of a five-member panel led by Lord Woolf CJ held:

The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents.

A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had

A already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal.

(iii) *Taylor*'s case, *supra*, was followed in *Seray-Wurie v. Hackney London Borough Council* [2002] 3 All ER 448 where a three-member panel of the English Court of Appeal held the same view but added that the court should exercise strong control over any such application, so as to protect those who were entitled reasonably to believe that the litigation was already at an end.

(iv) In *Re Uddin* [2005] 3 All ER 550, the English Court of Appeal again followed *Taylor*'s case in holding that whenever the residual jurisdiction established by the judgment in *Taylor*'s case was sought to be invoked, the court had to be satisfied that the case fell within the exceptional category there described before it would accede to the application and reopen the case. The *Taylor* jurisdiction could only be properly invoked where it was demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, had been critically undermined. The test would generally be met where the process had been corrupted. It might be met where it was shown that a wrong result earlier arrived at. It would not be met where it was shown only that a wrong result might have been arrived at.

[9] Thus, it is crystal clear from the above cases that the principles governing the jurisdiction and exercise of the power of review by the Federal Court is now well settled. The Federal Court, as the apex court, does have the jurisdiction and power to hear and review any matter brought before the court under r. 137 provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances where there is no alternative remedy available to prevent an injustice or to prevent an abuse of the process of the court.

[10] Having decided that the Federal Court does have the jurisdiction and power to hear this application, we unanimously overruled the preliminary objection raised by the respondent and accordingly invited learned counsel for the applicant to address us on the merits of the application.

Merits Of The Application

[11] Learned counsel for the applicant submitted that the evidence of PW3, the chemist, following the judgment of the Court of Appeal in *Loo Kia Meng v. PP* [2000] 3 CLJ 653, is defective in that the weight of the samples used for the analysis of the drug was not stated and thus urged this court to invoke r. 137 to set aside the applicant's conviction and sentence of death or to make such other order as may be deemed fit and proper by this court.

[12] It is now incumbent upon us to determine whether any injustice has been done to the applicant or whether an abuse of the process of the court has been committed so as to warrant the exercise of the inherent jurisdiction of this court. Of crucial importance is the meaning of the word "injustice". "Injustice" means (i) a lack of fairness or justice (ii) an unjust act (*The Concise Oxford Dictionary*, 9th edn. p 700). Whether an act is unjust or not is a question of law, and in this case, it must depend on the determination of whether the failure of the chemist (PW3) to specify the weight of the samples he used in the analysis of the drug in question is unjust so as to cause an injustice to the applicant or an abuse of process of the court which needs to be rectified or prevented.

[13] Learned counsel for the applicant cited the case of *Loo Kia Meng, supra,* in support of his application. In that case the appellant was convicted for trafficking in a dangerous drug, to wit 4,105 grammes of cannabis, under s. 39B(1) of the Act and was sentenced to death under s. 39B(2) of the Act. The appellant appealed to the Court of Appeal contending, *inter alia*, that the method of analysis adopted by the chemist was improper as it did not comply with s. 37(j) of the Act which required a minimum of 10% to be taken for analysis from the receptacle in which the drug was found whereas the chemist took 20 random samples for testing. The Court of Appeal, following the Supreme Court case of *Leong Bon Huat v. PP* [1993] 3 CLJ 603, held that by virtue of

s. 37(j) of the Act, it is incumbent for **the chemist to test a minimum of 10% of the drug**. On the facts, the 20 random samples taken by the chemist could amount either to more or less than 10%. The court was thus left in doubt as to the amount of samples that was tested and held that the benefit of the doubt must be given to the appellant. The Court of Appeal then allowed the appeal, by substituting the conviction and sentence for possession under s. 6 punishable under s. 39A(2) of the Act and sentenced the appellant to 15 years imprisonment and 10 strokes of the rotan. (emphasis added)

[14] It is worthy of note that an appeal in *Loo Kia Meng, supra,* by the Public Prosecutor to the Federal Court failed (see *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734). However, in that case, there was no written grounds of judgment by the Federal Court.

[15] In *Leong Bon Huat v. PP* [1993] 3 CLJ 603 the appellant was convicted for trafficking in a dangerous drug, to wit, 793.85 grammes of cannabis and was sentenced to death. When the appellant was arrested, he was carrying a black bag from which was recovered a bulk of dried leaves believed to be cannabis wrapped in a Chinese newspaper. The dried leaves were sent to the government chemist for examination and analysis and he concluded that it was cannabis within the meaning of s. 2 of the Act and that it weighed 793.85 grammes. From the testimony of the chemist it appeared that while the total weight of the plant material said to be cannabis was 793.85 grammes, the total weight of the samples taken for analysis was 'more than 10% of the net weight of 793.85 grammes' of the plant material. The chemist did not take any sample from the balance of the plant material, which formed a very substantial part of the whole, for analysis. The main ground of appeal was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s. 2 of the Act. The Supreme Court in allowing the appeal by substituting the conviction and sentence under 39A of the Act to a sentence of life imprisonment and 10 strokes of the rotan, *inter alia*, held:

> (1) If by the expression 'more than 10% of the net weight of 793.85g' is meant a little more than 10%, then the testimony of the chemist at best established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis which is required for the operation of the presumption of trafficking under s. 37(da) of the Act.

(2) While the physical examination of the whole of the plant material by the chemist might on the balance of probabilities establish that the plant material was cannabis within the meaning of s. 2 of the Act, it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved **the carrying out of chemical tests on adequate quantities of the plant material.** In the present case, the samples of the plant material upon which the chemist had carried out the chemical tests were inadequate, having regard to the total weight of the plant material. (emphasis added)

[16] In response to the applicant's submission, learned DPP for the respondent argued that there is no infirmity in the evidence of the chemist (PW3) in this case as he had positively affirmed that he did not rely on s. 37(j) of the Act and that he had analysed all the 17 packages sent to him for analysis.

[17] We respectfully agree with the learned DPP. The evidence of the chemist (PW3) is not defective as submitted by the applicant. As the chemist (PW3) had analysed all of the whitish substances in each of the 17 packages he did not rely on the provision of s. 37(j) of the Act. This is what he said in his evidence:

Saya menganalisakan 17 ketul semuanya. 17 ketul ini tidak dimasukkan dalam blender dengan sekali gus (p 90 of the exhibit WCK-1).

Saya tidak menurut peruntukan seksyen 37(j) di dalam membuat analisa (p 96 of the exhibit WCK-1).

[18] In the instant case, the presumption in s. 37(j) of the Act which reads:

when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, the contents of all the receptacles consist of or contain the same proportion of such drug.

is obviously inapplicable. It is clear from the evidence that the chemist had analysed all the 17 packages, ie, 100% or the whole quantity of the whitish substances handed to him and thereby making it unnecessary for the chemist and the prosecution to rely on s. 37(j) of the Act. In *Balachandran v. PP* [2005] 1 CLJ 85 (Ahmad Fairuz CJ, Pajan Singh Gill FCJ, Augustine Paul JCA (as he then was)), Augustine Paul JCA (as he then was) in delivering the judgment of the Federal Court said at p 98:

> The thrust of the first submission of learned counsel becomes a relevant matter for consideration only if the chemist had not analysed all the substances handed to him. The chemist had testified on the net weight of the pinkish substance in each of the five packages followed by the weight of monoacetylmorphines obtained from each package. This indicates that he had analysed all of the pinkish substances in each of the packages. It is confirmed by his evidence that the pinkish substances in the five packages were powdered during analysis. This makes it patent that the chemist had analysed all the substances handed to him thereby making it unnecessary for the prosecution to rely on s. 37(j).

See also *Looi Kow Chai, supra.*

[19] In any event it is our view that the ten per centum stipulated in s. 37(j) refers to the number of receptacles and not the total weight of the drug found or the total amount or weight of the samples taken for analysis. Section 37(j) only requires the taking of samples from ten per centum of the total number of the receptacles and not the drug. It is for the chemist to determine the sufficiency of the weight of the drug required for the analysis. This has been lucidly explained in *Gunalan a/l Ramachandran & Ors. v. PP* [2004] 4 CLJ 551 CA with which we agree.

[20] On the sufficiency of the evidence of the chemist, we wish to reiterate that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless the evidence is so inherently incredible that no reasonable person can believe it to be true or the defence calls evidence in rebuttal by another expert (see *Balachandran, supra; Munusamy v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391; *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151).

[21] With regard to the chemist's evidence in *Leong Bon Huat*, Abdul Hamid Mohamad JCA (as he then was) said in *Gunalan a/l Ramachandran, supra,* at p 578: A

> With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v. Lam San.* With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis. As seen in *Public Prosecutor v. Lam San* the 10% is nothing more that the practice among chemists. B C

The above view was shared by Abdul Aziz Mohamad JCA (as he then was) in a separate judgment in the same case at p. 592 when he said: D

> No law or statute has laid down the process which a chemist is bound to use in order to prove the nature of a substance as being or as containing a particular dangerous drug or the weight of the dangerous drug in a bulk of the substance. The process belongs to the realm of science and is devised according to the discipline and principles of science. E

It is to be noted that the above observations of the learned judges have since received approval *sub silentio* from the Federal Court (see *Gunalan a/l Ramachandran & Ors. v. PP* [2006] 1 CLJ 857). With respect, we agree with the views of both the learned judges. It is clear therefore that there is no requirement for the amount or the weight of the samples of the drug to be taken for the purpose of analysis by the chemist. It is up to the chemist to carry out the analysis scientifically. It is also for the chemist to determine the adequacy of samples for the purpose of analysis. If the defence wishes to challenge the sufficiency of the weight of the drug analysed the chemist's evidence must be challenged and evidence in rebuttal must be led, if necessary. F G H

[22] In *PP v. Ooi Teng Chian* [2005] 4 CLJ 557 CA the chemist (SP2) in her examination-in-chief stated that the weight of the samples did not reach 10% of the weight of the heroin or monoacetylmorphines because in the scientific analysis there is no authority that 10% of the samples must be taken. According to her, the result of the analysis would be the same regardless of I

whether the weight of the samples taken for the analysis is less than 10% or exceed 10% of the weight of the drugs. This is what she said in answer to the question at p. 575 of the report:

> S: Adakah berat sampel-sampel tersebut telah mencapai 10% daripada keseluruhan berat peratusan heroin dan monoacetylmorphines tadi?
>
> J: Jumlah berat sampel-sampel tersebut tidak mencapai 10% daripada berat heroin atau monoacetylmorphines kerana dalam analisis secara scientific tidak ada othoriti yang mewajibkan pengambilan sampel sebanyak 10%. Saya tidak perlu mengambil sampel sebanyak 10% kerana sampel yang melebihi 10% berat memberikan keputusan yang sama dengan keputusan yang diberikan oleh sampel yang kurang 10% berat. Peratusan sampel tidak memberikan keputusan yang berbeza. Saya telah mengambil sampel yang mencukupi untuk tujuan analisis berdasarkan standard operation procedure yang dikeluarkan oleh Jabatan Kimia Malaysia. Standard Operation Procedure ini adalah berdasarkan United Nations Manual dan diikuti oleh semua cawangan Jabatan Kimia Malaysia. ...

In that case there was no evidence in rebuttal against her evidence and as such, her evidence was accepted by the court. The Court of Appeal (Richard Malanjum, Hashim Yusoff, Augustine Paul, JJCA (as they then were)) found that the chemist had followed the correct procedure in carrying out the analysis as was explained in *Gunalan a/l Ramachandran, supra*. And it follows therefore that the samples analysed by the chemist are sufficient in law to support her conclusion.

[23] Therefore, with profound respect, *Loo Kia Meng, supra,* insofar as it holds that a minimum of 10% of the drug must be taken for analysis and *Leong Bon Huat, supra,* insofar as it holds that the chemical tests must be carried out on adequate quantities (samples) of the drug, are decisions with which we are unable to agree and they should not be followed.

[24] Hence, the chemist in the present case cannot be faulted and his testimony is not defective. Accordingly, the applicant's reliance on *Loo Kia Meng* is misconceived.

[25] In view of what we have said above regarding *Loo Kia Meng* and *Leong Bon Huat*, we cannot fathom how it can be said that there is any infirmity in the evidence of the chemist when he had positively affirmed that he did not rely on s. 37(j) of the Act and that he had analysed all the 17 packages sent to him for analysis. Indeed, there is no lack of fairness or justice in the evidence of the chemist. This is not the kind of case where this court should invoke its inherent powers under r. 137. There was absolutely no injustice caused to the applicant nor was there any abuse of the process of the court in the conviction and sentence of the applicant.

26] In the result the motion is dismissed.